

Cut the Cap

The Commission Should Repeal the Interim Cap on High-Cost Universal Service Support Received by Wireless Carriers

RURAL CELLULAR ASSOCIATION

Position Paper

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I. INTRODUCTION AND SUMMARY.

The Commission should act to repeal the interim cap it imposed last year on high-cost support received by competitive eligible telecommunications carriers (“ETCs”) because the cap was unnecessary and unjustified at the time it was imposed, it has harmed and continues to harm consumers in rural and high-cost areas by unduly interfering with the ability of wireless ETCs to deploy infrastructure and deliver service, and its harmful effects are being exacerbated by the worsening national economic climate.

The Commission’s theory in the *Interim Cap Order*¹ was that (1) increased disbursements to competitive ETCs had placed the Universal Service Fund (“Fund”) in dire jeopardy; (2) the increase disbursements to com-

petitive ETCs was unexpected because the Commission was wrong in its expectation that wireless services would act as complete substitutes for wireline services in rural and high-cost areas; (3) continued growth in high-cost support to competitive ETCs was unsustainable; (4) an interim cap, imposed only on competitive ETCs, was necessary to avert a crisis that could cripple the Fund; and (5) such a cap would not require abandoning the Commission’s principle of competitive neutrality, but merely temporarily “reprioritizing” the principle.

The Rural Cellular Association (“RCA”) will show in this Position Paper that the Commission was wrong on all counts. Even worse, data prepared by RCA demonstrates the harmful curtailment of funding for wireless services and infrastructure deployment in certain states, and there is a strong likelihood that this reduced funding will harm consumers and interfere with the ability of competitive ETCs to meet operational and capital investment commitments made to state commissions.

¹ *High-Cost Universal Service Support*, WC Docket No. 05-337, CC Docket No. 96-45, Order, 23 FCC Rcd 8834 (2008) (“*Interim Cap Order*” or “*Order*”), appeal docketed, RCA v. FCC, Nos. 08-1284 & 08-1285 (D.C. Cir. Aug. 29, 2008).

The difficulties involved in providing wireless services and deploying wireless infrastructure in rural and high-cost areas are being magnified by the deteriorating national economy. A Commission policy that reduces high-cost support to wireless ETCs, which was ill-considered at the time it was imposed, has been made even more noxious because it is choking off support to carriers that need funding to continue serving rural and high-cost areas in the midst of a growing economic crisis.

II. BACKGROUND.

The Commission adopted the *Interim Cap Order* on April 29, 2008, implausibly heralding its action as a “crucial” and “necessary” first step in paving the way for universal service and intercarrier compensation reform.²

² FCC News, “Interim Cap Clears Path for Comprehensive Reform,” May 2, 2008. Although the Commission claimed that the cap was necessary to “stabilize” the Fund during the pendency of the agency’s efforts to adopt universal service and intercarrier compensation reform, *id.*, the Commission never explained why it did not simply devote all of its effort and resources to pressing ahead with reform. Further, as RCA discusses in this Position Paper, the Commission also failed to provide any evidence that the Fund was in need of stabilization, or that a unilateral cap on competitive ETCs would actually be an effective means of “stabilizing” the Fund.

Although the Commission had sought to adopt universal service reform prior to the November 20, 2008, statutory deadline for action on recommendations made by the Federal-State Joint Board on Universal Service (“Joint Board”) on November 20, 2007, the Commission ultimately refused to implement the Joint Board’s recommendations, and then abandoned any near-term plans to adopt any universal service or intercarrier compensation reform measures. *See High-Cost Universal Service Support, Federal*, CC Docket Nos. 96-45, 96-98, 99-68, 99-200, 01-92, WC Docket Nos. 03-109, 04-36, 05-337, 06-122, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 2008 WL 4821547 (2008); *High-Cost Universal Service Support*, WC Docket No. 05-337, CC Docket No. 96-45,

The Commission capped total annual competitive ETC support for each state at the level of support that competitive ETCs were eligible to receive during March 2008 on an annualized basis.³

On August 1, 2008, RCA, Cellular South Licenses, Inc., NE Colorado Cellular, Inc., Cellcom Companies, Carolina West Wireless, Inc., Bluegrass Cellular, Inc., Leaco Rural Telephone Cooperative, and MTPCS, LLC (“Petitioning Parties”), jointly filed a petition seeking reconsideration of the *Interim Cap Order* by the Commission. When it became evident that no other party had sought reconsideration of the *Order*, the Petitioning Parties withdrew their petition for reconsideration and filed petitions for review with the U.S. Court of Appeals for the District of Columbia Circuit on August 29, 2008.⁴

Recommended Decision, 22 FCC Rcd 20477 (JB 2007); Communications Daily, Dec. 31, 2008, at 7 (reporting a statement made by then Chairman Martin that the Commission would not act on any universal service reform proposals during the remainder of his chairmanship). Commission action on universal service reform still does not appear to be likely anytime soon. *Cf. Jeff Silva, As AWS-3 and D-Block Auctions Hang in Limbo, Copps’ FCC Aims To Improve Morale*, RCR WIRELESS, Feb. 25, 2009 (the Commission “is unlikely to take major actions on key wireless policies anytime in the near future, as the agency awaits a new Obama-appointed chairman and as acting head Michael Copps remains laser-focused on ensuring a smooth re-set digital TV transition, even as he begins to lay the foundation for anticipated management reforms.”), accessed at <http://www.rcrwireless.com/article/20090225/WIRELESS/902249981/1103>.

³ *Interim Cap Order*, 23 FCC Rcd at 8834 (para. 1).

⁴ The Petitioning Parties withdrew their petition for reconsideration filed with the Commission in favor of appealing the *Interim Cap Order* to the D.C. Circuit. They realized that it would be futile to ask the Commission to reconsider the imposition of the interim cap.

In the Joint Brief supporting their petitions for review of the *Interim Cap Order*, the Petitioning Parties argued that, since the Commission failed to show that a crisis threatening the high-cost fund existed, it was arbitrary and capricious for the agency to immediately impose an interim cap on competitive ETC universal service support to avert the alleged crisis, and that the Commission violated statutory rulemaking requirements by enforcing an interim cap on competitive ETC support six months before the agency actually adopted the cap in a notice-and-comment rulemaking proceeding. The Petitioning Parties also contended that it was arbitrary, capricious, and a violation of Section 254(b) of the Communications Act of 1934 (the “Act”)⁵ for the Commission to impose an interim cap on competitive ETC high-cost fund support for the sole and purported purpose of ensuring the sustainability of the Fund.

III. DISCUSSION.

This Position Paper focuses on policy concerns and changed economic circumstances that together provide a compelling basis for the Commission to repeal the interim cap imposed in the *Interim Cap Order*.⁶ RCA

⁵ 47 U.S.C. § 254(b).

⁶ RCA will not address at length the Commission’s failure to adhere to the notice-and-comment rulemaking requirements of the Administrative Procedure Act (“APA”). See 5 U.S.C. § 533. The imposition of the interim cap was flatly inconsistent with the Commission’s “identical support rule,” because it prevents a competitive ETC from receiving the same amount of support as the local incumbent LEC is provided on a per-line basis. See 47 C.F.R. § 54.307(a)(3). Instead of repealing the identical support rule, which it clearly intended to do, see *Interim Cap Order*, 23 FCC Rcd at 8844 (para. 21), the Commission imposed its cap on competitive ETC funding on an interim basis until it conducted the rulemaking necessary to repeal the rule. That was unlawful since the Commission was bound by its identical support rule until the rule was repealed in

strongly believes that action by the Commission is needed now. The problems that have been caused by the interim cap are urgent, severe, and ongoing. Consumers in rural and high-cost areas are being harmed by the interim cap because the reduction in funding resulting from the cap interferes with their opportunity to rely upon wireless services in their everyday endeavors and in emergency situations. As the interim cap chokes off their funding, competitive ETCs are finding it increasingly difficult to maintain their efforts to deploy wireless infrastructure and bring services to rural consumers.

In addition, the need for action by the Commission is made even more imperative by the fact that the interim cap represents an anomalous and unproductive contraction of federal support at a time when the health of the overall national economy urgently needs the stimulus that can be provided by an expansion of critical telecommunications infrastructure in rural areas. Further, the Commission should give a priority to removing the “interim” cap because, although the Commission emphasized its intention that the cap would be imposed only on an interim basis, the agency has failed to deliver on this promise, and rural consumers and wireless ETCs now face the prospect of the cap remaining in place indefinitely, unless the D.C. Circuit forces the Commission to remove it.

accordance with the APA. The Commission violated the APA again when it proceeded to prejudge the issue of whether the interim cap should be adopted by imposing the cap, *sua sponte*, on a competitive ETC six months before it issued its *Interim Cap Order*. See *ALLTEL Corp. and Atlantis Holdings LLC*, 22 FCC Rcd 19517, 19520-21 (2007). By virtue of the interim cap, competitive ETCs are not receiving the level of high-cost support to which they are entitled under the Commission’s identical support rule, which still remains in effect.

The Commission explicitly indicated in the *Interim Cap Order* that the cap was “only an interim measure” that would be in place only until the agency adopted Fund reforms.⁷ The Commission rejected proposals to adopt a fixed sunset date for the cap, promising interested parties that “the interim cap’s life will be of limited duration”⁸ and that the agency would complete final action on a reform package “as quickly as feasible” after the closing of the pleading cycle on the agency’s reform proposals.⁹ The pleading cycle closed on May 19, 2008. Two weeks before the November 20, 2008, deadline for the Commission’s action on the reform recommendations made by the Joint Board,¹⁰ the Commission rejected the Joint Board’s recommendations. Now, with the prospect of Fund reform slipping further and further into the future, the Commission’s “interim” cap has taken on a life of its own and will remain in effect (based upon the Commission’s formulation in the *Interim Cap Order*, and barring intervention by the D.C. Circuit or action by the Commission to repeal the cap) until the agency completes its “expeditious” action on Fund reform.

In the following sections, after summarizing the Commission’s stated rationale for adopting the *Interim Cap Order*, RCA will demonstrate that the Commission’s action in imposing the interim cap was a mistake. The Fund was not—and is not—in jeopardy, growth rates in competitive ETC high-cost disbursements would not have reached an unsustainable level in the absence of a cap, the Commission failed to support its claim that

consumers would be harmed if the cap was not imposed, the Commission did not and could not demonstrate that there was any supportable basis for its imposition of the cap only on competitive ETCs and not on incumbent local exchange carriers (“LECs”), and the Commission failed to make any showing that the unilateral cap on wireless ETC disbursements would actually solve the crisis that the agency claimed to exist.

In addition, RCA will discuss the fact that the interim cap, by depriving consumers in rural and high-cost areas of the full benefits of wireless services, is not only ineffective in achieving the Commission’s stated goals (which were wrongly formulated in any event), but is also harmful to consumers. Finally, RCA will underscore the fact that the harmful effects of the cap are compounded by the difficulties imposed upon rural consumers and wireless ETCs by the Nation’s mushrooming economic crisis.

A. Summary of the Commission’s Rationale for Imposing the Interim Cap.

The Commission based its actions in the *Interim Cap Order* on its belief that the high-cost fund was in “dire jeopardy[,]”¹¹ pointing to what it described as a “current explosion of high-cost universal service support”¹² and citing a \$1.7 billion increase in the high-cost fund from 2001 to 2007.¹³ The agency attempted to build its case for the cap by observing that high-cost fund support for competitive ETCs had reached \$1.18 billion in 2007,¹⁴ and then by making the assumption that the annual growth rate for competitive

⁷ *Interim Cap Order*, 23 FCC Rcd at 8850 (para. 37).

⁸ *Id.* at 8845 (para. 23).

⁹ *Id.* at 8850 (para. 37).

¹⁰ The Commission is required by statute to act not later than one year after receiving a recommendation from the Joint Board. 47 U.S.C. § 254(a)(2).

¹¹ *Interim Cap Order*, 23 FCC Rcd at 8837 (para. 6).

¹² *Id.* at 8850 (para. 37).

¹³ *Id.* at 8837 (para. 6).

¹⁴ *Id.* at 8837-38 (para. 6).

ETC funding could be more than 100 percent in future years (based on the agency's calculation of the average annual growth rate between 2001 and 2007).¹⁵ The Commission found that this projected rate of growth was "unsustainable" and "could cripple" the overall Fund,¹⁶ and that, therefore, it was necessary to take action to stem "the dramatic growth in high-cost support."¹⁷

The Commission concluded that continued growth of the high-cost fund would render the amount of high-cost support "unsustainable[.]"¹⁸ threatening to undermine the viability of the overall Fund, that disbursements to wireless ETCs represented the fastest-growing portion of high-cost support, and that, based upon this conclusion, the agency had reasonable grounds to temporarily "reprioritize" its universal service principles, by suspending application of the competitive neutrality principle and imposing a cap only on competitive ETCs, but not on incumbent LECs.¹⁹ The Commission also attempted to fend off arguments that an interim cap would violate the agency's identical support rule²⁰ by suggesting that the rule had turned out to be a mistake, in part because the Commission had incorrectly assumed that wireless services would provide a complete substitute for wireline services.²¹ The agency reasoned that, since this substitution had not occurred, the

high-cost fund had increased at a greater rate than had been anticipated.

In the following sections, RCA examines the findings and conclusions summarized above, and demonstrates that the Commission's decision to impose the interim cap based upon these flawed findings and unsupported conclusions was a mistake.

B. The Commission Failed To Provide Sufficient Factual Support for the Interim Cap.

The proposal made by the Commission when it initiated the interim cap rulemaking proceeding was a drastic action by any measure.²² Specifically, the agency was seeking to impose a funding cap that would involve the unilateral disruption of support to one segment of ETCs (wireless carriers) serving rural and high-cost areas, with the significant risk of attendant harmful effects on the customers of those carriers. At the same time, another segment of ETCs (incumbent LECs) would be completely exempt from the proposed cap. Given the patently discriminatory nature of the Commission's proposal, and the prospect that the proposed cap would adversely affect the deployment of infrastructure and delivery of services in rural and high-cost areas, the agency had a responsibility to back up its claim that an urgent, immediate, and severe need existed that would justify the Commission's proposed action.

The agency's obligation to make such a showing was heightened by the fact that the Commission, contemporaneously with its deliberations regarding the interim cap, was attempting to develop comprehensive universal service reforms. These reforms could serve as

¹⁵ *Id.* at 8838 (para. 6).

¹⁶ *Id.* at 8844-45 (para. 22).

¹⁷ *Id.* at 8838 (para. 7).

¹⁸ *Id.* at 8845 (para. 22).

¹⁹ *Id.*

²⁰ The identical support rule requires that an equal amount of per line high-cost support must be distributed to incumbent LECs and to competitive ETCs. See 47 C.F.R. § 54.307(a).

²¹ *Interim Cap Order*, 23 FCC Rcd 8843 (paras. 19-21).

²² See *High-Cost Universal Service Support*, WC Docket No. 05-337, CC Docket No. 96-45, Notice of Proposed Rulemaking, 22 FCC Rcd 9705 (2007) ("*Interim Cap Notice*").

an appropriate and effective vehicle for addressing the sufficiency of the high-cost fund and the overall Fund, thus avoiding any need to cap high-cost support on an interim and unilateral basis.

In adopting the interim cap, the Commission failed to meet this obligation in four principal respects. First, the Commission failed to support its off-handed claims that the Fund was in dire jeopardy and that continued growth in competitive ETC high-cost funding would make high-cost support and the overall Fund unsustainable. Second, the Commission made a passing assertion that consumers would be harmed if the cap was not imposed, but it provided no discussion or analysis in support of this claim. Third, the agency's attempt to justify the discriminatory imposition of the interim cap on competitive ETCs failed to adequately explain or defend the Commission's decision to shelve the principle of competitive neutrality. Fourth, the Commission asserted that capping wireless ETC high-cost support would save the Fund from the dire jeopardy it faced, but the agency did not make any effort to explain or quantify how the unilateral cap would actually carry out this rescue. Each of these critical failures is discussed by RCA in the following sections.

1. *The Commission's Statements That the Universal Service Fund Was in Dire Jeopardy and Was Facing Unsustainable Growth Were Wrong.*

The Commission's decision to impose an interim cap on high-cost support disbursed to competitive ETCs principally rested on the agency's claims that the recent and projected rates of growth in competitive ETC support were unsustainable, and that this growth in funding had placed the overall Fund in dire jeopardy. The Commission failed, however,

to produce any credible evidence that either the Fund or high-cost support was on the brink of becoming unsustainable. The evidence the Commission did produce was neither probative nor persuasive.

First, if it was concerned that the Fund was facing a crisis, the Commission should have looked first at the average annual growth rate of the Fund itself, not at the growth rate of a component of one of the four programs the Fund supports. Tellingly, the Commission made no findings whatsoever as to the growth of the Fund. The Commission's analysis should have begun with the finding that the Fund had grown from \$4.66 billion in 2001 to \$6.95 billion in 2007,²³ an average annual growth rate of just over 7 percent. However, the continued growth of the Fund at a rate of 7 percent a year appears sustainable. So the Commission found that high-cost support to competitive ETCs had an average annual growth rate of "over 100 percent" and jumped to the misleading conclusion that the continued growth of the *Fund* "at this rate is not sustainable."²⁴

Second, the Commission observed that high-cost support to competitive ETCs had grown from under \$17 million in 2001 to \$1.18 billion in 2007.²⁵ The problem with this point, which the Commission failed to acknowledge, is that the level of support received by competitive ETCs in 2007 was well below the level of support that had been projected by the Joint Board when it made its recommendation for imposition of an interim

²³ See 2001-2007 Annual Reports of the Universal Service Administrative Company, accessed at http://www.usac.org/_res/documents/about/pdf/usac-annual-report-2007.pdf.

²⁴ *Interim Cap Order*, 23 FCC Rcd at 8837-38 (para. 6).

²⁵ *Id.*

cap.²⁶ The fact that the Joint Board's 2007 projection was off by more than 32 percent should have sounded alarm bells for the Commission as it deliberated about whether to embrace the Joint Board's analysis and recommendation that an interim cap should be imposed. Instead, the Commission simply ignored the discrepancy, apparently concluding, without any further analysis, that the \$1.18 billion high-cost funding level for competitive ETCs provided a reasonable basis for capping competitive ETC funding, notwithstanding the fact that the Joint Board's concerns and recommendations had been based upon wildly inaccurate projections of high-cost fund growth.

Third, the Commission compounded its error by relying upon another faulty analysis made by the Joint Board. In its *Recommended Decision* the Joint Board had observed that competitive ETC funding had increased at an annual rate of more than 100 percent between 2000 and 2006.²⁷ But the Joint Board did not believe that competitive ETC funding would continue to grow more than 100 percent a year. It predicted that such funding, unless capped, would grow from "almost \$1 billion" in 2006 to "at least \$1.28 billion" and "as much as \$1.56 billion" in 2007, which would

be an increase in funding of between 28 and 56 percent.²⁸ Rather than recognizing the obvious fallacy in the Joint Board's analysis, the Commission was content to simply update the Joint Board's finding by stating that the average annual growth rate in competitive ETC funding between 2001 and 2007 was in excess of 100 percent.²⁹

Then, the Commission made the critical finding that "the continued growth of the fund *at this rate* [of more than 100 percent per year] is not sustainable"³⁰ The Commission's finding of unsustainability formed the basis for its conclusion that "immediate action must be taken to stem the dramatic growth in high-cost support."³¹ What the Commission neglected to do was to analyze the likelihood that high-cost support would actually grow by more than 100 percent annually in future years. Presumably, if the agency had undertaken this analysis and concluded that a much lower rate of growth was more likely, then the Commission would have rejected the Joint Board's assertions about the dire jeopardy facing the overall Fund and would have refused to impose the interim cap.

In failing to undertake any analysis of the Joint Board's concerns about the level of annual growth rates in competitive ETC support, the Commission overlooked, in the record of its interim cap rulemaking proceeding, an argument that:

[a]lthough the Joint Board tries to paint an alarming picture of threats to the fund posed by significant percentage increases in CETC support, these percentage increases in annual

²⁶ *High-Cost Universal Service Support*, WC Docket No. 05-337, CC Docket No. 96-45, Recommended Decision, 22 FCC Rcd 8998, 9000 (para. 4 & n.15) (JB 2007) ("*Recommended Decision*") (predicting that competitive ETC funding could reach \$1.56 billion in 2007, even without taking into account the effect of states granting any pending competitive ETC designation petitions). The Joint Board was also off the mark in its projection that competitive ETC high-cost funding would reach "almost \$2 billion" in 2008. *Id.* at 9000 (para. 4). Actual competitive ETC funding in 2008 was \$1.31 billion. See Federal and State Staff for the Joint Board, 2008 *Monitoring Report* at 3-15.

²⁷ *Recommended Decision*, 22 FCC Rcd at 9000 (para. 4).

²⁸ *Id.*

²⁹ *Interim Cap Order*, 23 FCC Rcd at 8837-38 (para. 6).

³⁰ *Id.* at 8838 (para. 6) (emphasis added).

³¹ *Id.* at 8838 (para. 7).

growth rates are largely a product of the fact that CETCs are new entrants who started with a baseline of zero support from the fund. As competitive entry has advanced, CETCs' share of the fund has increased correspondingly.³²

In other words, as the Commission itself later concluded in arguments made to the D.C. Circuit, the annual rate of growth of competitive ETC support in recent years is not a reliable predictor of future growth because the percentages from 2001 to 2007 were skewed by a growth rate of more than 1,000 percent in 2001 (on a small base of support of approximately \$1.5 million in 2000).³³

The effect of these "front loaded" high percentages of funding growth has been to reduce the annual rate of growth in later years, as competitive ETCs have become more established as service providers in rural and high-cost areas. The annual growth rate of competitive ETC funding has decreased every year since 2003.³⁴ For example, the percentage increase in competitive ETC support from 2006 to 2007 was 21.9 percent.³⁵ Even the Joint Board, in a departure from its dire conclusions about the pressures on the high-cost fund and the overall Fund, projected that competitive ETC funding would increase by 25 percent (not more than 100 percent) between 2008 and 2009.³⁶

³² RCA and Alliance of Rural CMRS Carriers ("ARC"), Comments on *Interim Cap Notice* (June 6, 2007) ("RCA and ARC Comments") at 9.

³³ See FCC, Opposition to Movants' Motion for Stay Pending Judicial Review, D.C. Cir. Nos. 08-1284 & 08-1285 (Oct. 21, 2008) at 1, 12.

³⁴ See *2008 Monitoring Report* at 3-15.

³⁵ See *id.*

³⁶ See *Recommended Decision*, 22 FCC Rcd at 9000 (para. 4).

Further evidence that the growth of high-cost funding for competitive ETCs was not likely to threaten the sustainability of the Fund can be found by examining the projected amount by which high-cost disbursements to competitive ETCs will be reduced in 2009 as a result of the cap, and comparing this amount of reductions to the overall size of the Fund. RCA has estimated that the total annualized amount of reductions in high-cost fund disbursements to competitive ETCs in 2009 in all states and U.S. territories, as a result of the imposition of the interim cap, is approximately \$340,898,000.³⁷ This funding reduction represents about 4.90 percent of the overall uncapped Fund.³⁸

This comparison demonstrates that there was little reason for the Commission to be concerned that increases in competitive ETCs' high-cost funding would make the Fund unsustainable. Although the interim cap had only a negligible effect upon the size of the overall Fund, it must be emphasized that the cap has had a much greater effect upon wireless ETCs and the amount of high-cost funding available in particular states.³⁹

It is misleading to assert that the average rate of growth in competitive ETC high-cost support in recent years is a reliable measure of future growth. Thus, there was no basis for the Commission's conclusion in the *Interim Cap Order* that the rate of growth in competi-

³⁷ This estimate was derived based upon second quarter 2009 high-cost projections prepared by USAC in High-Cost Appendix HC01 (capped funding) and High-Cost Appendix HC01A (uncapped funding). See USAC website, accessed at <http://www.usac.org/about/governance/fcc-filings/2009/>.

³⁸ The most recent estimate of total Fund support published by USAC (for 2007) is \$6.95 billion. See USAC website, accessed at <http://www.usac.org/about/universal-service/fund-facts/fund-facts.aspx>.

³⁹ These issues are discussed in Section III.C.2., *infra*.

tive ETC high-cost support would more than double annually in future years.

Third, the agency failed to analyze the point at which the size of the Fund would push it across the line from viability to unsustainability, or to provide any explanation of the criteria it was using to evaluate the sustainability of the Fund.⁴⁰ The significance of these failures is discussed in the following section.

2. *The Commission Did Not Provide Any Basis for Its Claim That Consumers Would Be Harmed Unless the Commission Imposed an Interim Cap.*

The Commission's failure to explain what it meant by the "sustainability" of the Fund should be sufficient reason, by itself, for the Commission now to repeal the interim cap, because this failure makes it evident that the agency had no reason to conclude that the cap was necessary. If the Commission had no defined method for determining at what point the Fund would collapse (or for determining what characteristics or yardsticks could be used to decide whether the Fund had entered or was about to enter a state of unsustainability), then the agency had no basis for concluding that an immediate cap on competitive ETC support was necessary to keep the Fund from becoming unsustainable.

Even though the Commission did not directly articulate any test or method for determining "unsustainability," the *Interim Cap Order* does give some hint of the assumptions

⁴⁰ RCA notes that the D.C. Circuit has been asked to decide the issue of whether the Commission's application of a test of Fund "sustainability" has any statutory basis, or whether it is an invention by the agency that extends beyond the agency's statutory authority. See Joint Brief at 47-51.

the Commission was making. But this hint only opens the door to more problems with the Commission's analysis.

In addition to claiming that it would not be sustainable for high-cost support to continue to grow at a rate of more than 100 percent annually, the Commission also expressed the view that such a growth rate "would require excessive (and ever growing) contributions from consumers to pay for this fund growth."⁴¹ The Commission thus provided the hint (without any discussion or analysis) that it adhered to the view that excessive contributions from consumers would make the Fund unsustainable. There are several problems with the agency's unexplained formulation.

First, without any support, the Commission seems to equate its projection of annual increases in competitive ETC high-cost funding of more than 100 percent with annual increases *in the overall Fund* of more than 100 percent.⁴² As the Petitioning Parties have pointed out to the D.C. Circuit, high-cost support to competitive ETCs increased from 2005 to 2006 by 54 percent, but total high-cost support increased by only 7 percent, and total Fund support increased by less than 2 percent.⁴³ The Commission failed to even address, much less explain, how an annual growth rate of less than 2 percent could place the overall Fund in dire jeopardy of becoming "unsustainable."

⁴¹ *Interim Cap Order*, 23 FCC Rcd at 8838 (para. 6).

⁴² See *Interim Cap Order*, 23 FCC Rcd at 8838 (para. 6) (finding "that the continued growth of the fund at this rate ["the fund" refers back to the Commission's reference to the federal universal service fund in the same paragraph, and "this rate" refers to the supposed annual increase in competitive ETC high-cost support at the rate of more than 100 percent] is unsustainable") (emphasis added).

⁴³ See Joint Brief at 38 n.45.

Second, in order to engage in any rational decision-making, the Commission, as part of its concluding that excessive levels of consumer contributions would make the Fund unsustainable, would also need to quantify the level of excess that would produce this undesired result. Even assuming that the Commission was correct in surmising that the Fund would grow by more than 100 percent annually in the absence of a cap—which RCA has shown to be a completely groundless assumption, with respect to either high-cost support or the overall Fund—the Commission would need to support its concerns about sustainability by providing some analysis and calculations demonstrating that there would be a point at which the Fund would collapse because contribution levels would drive up carriers’ rates to levels that would “pric[e] some consumers out of the market.”⁴⁴

The Commission failed to make any such analysis. It did not determine the current level of consumer contributions, it did not calculate or quantify the extent to which consumer contributions would increase in the absence of an interim cap, and it did not present any criteria, algorithms, or other analysis sufficient to project at what point any increased levels of consumer contributions would become so excessive that the Fund no longer could be sustained. This failure results in the interim cap resting on thin air, not on any reasoned analysis or support.

Third, instead of attempting any direct calculations of consumer contributions or the rates by which these contributions would increase if the Commission did not impose an interim cap, the agency attempted to obliquely rely on the quarterly contribution factors calculated by the Universal Service Administrative Company (“USAC”), and used to deter-

mine Fund assessments paid by carriers and other telecommunications providers, as a surrogate for contributions from consumers.⁴⁵

After worrying about “excessive (and ever growing) contributions from consumers” the Commission observed in a footnote that, “[i]n the second quarter of 2007, the contribution factor reached 11.7 percent, which is the highest level since its inception.”⁴⁶ The Commission apparently intended to imply that this contribution factor (now at its “highest level”) supported a conclusion that competitive ETC high-cost fund disbursements were already exacting an unprecedented toll on Fund assessments, that these increased assessments were burdening consumers, that this burden would soon become excessive if competitive ETC support was not capped, and that these excessive contribution levels would result in an unsustainable Fund.

This implied line of argument collapses under its own weight. While the Commission attempted to laden the 11.7 percent contribution factor with these ominous implications, it avoided any explanation of how USAC had actually arrived at this 11.7 percent factor, which represented an increase over the previous quarterly contribution factor of 9.7 percent. Fortunately, then Chairman Martin had provided such an explanation in a letter, sent to the chairman of a House of Representatives subcommittee, released almost one year be-

⁴⁴ *Alenco Communications v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000).

⁴⁵ Although the Commission pointed out that carriers and other providers subject to the assessments “almost always” pass these assessments through to their customers, *Interim Cap Order*, 23 FCC Rcd at 8838 (para. 6, n.27), RCA asserts that it is not reasonable decision-making to use the contribution factors as a rough and complete substitute for any analysis of trends in the amounts of monthly surcharges paid by end users, and the burdens imposed by these surcharges.

⁴⁶ *Id.*

fore the release of the *Interim Cap Order*. Chairman Martin advised that:

Several factors contributed to the two percent increase of the contribution factor for the second quarter of 2007. The largest single factor was prior period adjustments that acted to reduce the Universal Service Fund's revenue requirements in previous quarters. Specifically, these prior period adjustments arose from additional contributions made by AT&T and Verizon on past under-reported revenue, and from a change in the amount of funds that the Universal Service Administrative Company held in reserve for bad debts. The absence of these prior period adjustments caused a 1.5 percent increase in the contributions factor. The remaining 0.5 percent of the increase was due to reductions in the funding base, [and] increases in program demand, including for high-cost support.⁴⁷

In other words, increases in the level of high-cost support attributable to disbursements to competitive ETCs had very little to do with the increase of the contribution factor to 11.7 percent. To put Chairman Martin's explanation another way, the amount of the increase in the contribution factor that resulted from high-cost fund disbursements to wireless ETCs was a fraction of a fraction (total high-cost support) of a fraction (overall program demand) of a fraction (reductions in the funding base plus overall program demand) of a

⁴⁷ Letter from Kevin J. Martin, Chairman, FCC, to Edward J. Markey, Chairman, Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce, U.S. House of Representatives (rel. May 14, 2007), Attachment at 1, *cited in* RCA and ARC Comments at 6 n.11.

fraction (0.5 percent of the overall 1.5 percent increase in the factor).⁴⁸

If this were not enough, the Commission itself was forced to admit in the *Interim Cap Order* that "[t]he [11.7 percent] contribution factor has since declined slightly to 11.3 percent in the second quarter of 2008."⁴⁹ It therefore can be concluded that, even if the Fund contribution factor could serve as a surrogate and the exclusive basis for determining whether consumer contributions are likely to become "excessive" (and the Commission did not even attempt to make such a showing), the Commission's reliance on the 11.7 percent contribution factor in the *Interim Cap Order* does not begin to make any case that consumers are being priced out of the market by the level of competitive ETC high-cost disbursements.

Fourth, while the Commission sought to imply a link between the contribution factor and excessive consumer contributions to the Fund, it chose to ignore evidence in the record demonstrating that increases in competitive ETC high-cost disbursements would have a minimal impact on consumers' monthly tele-

⁴⁸ We note that the contribution factor for the second quarter of 2009 reflects a similar increase, from 9.5 percent to 11.3 percent. *See* FCC Public Notice, *Proposed Second Quarter 2009 Universal Service Contribution Factor*, CC Docket No. 96-45, DA 09-584 (OMD Mar. 13, 2009) at 1; FCC Public Notice, *Proposed First Quarter 2009 Universal Service Contribution Factor*, CC Docket No. 96-45, 23 FCC Rcd 17947, 17947 (OMD 2008). Projected program support for the high-cost fund (before taking into account administrative expenses, the application of interest income, and the application of periodic true-ups) increased 1.07 percent between the first and second quarters. In RCA's view, this illustrates that overall increases in the contribution factor have little to do with the amount of high-cost funding received by wireless ETCs.

⁴⁹ *Interim Cap Order*, 23 FCC Rcd at 8838 (para. 6 n.27).

phone bills. Specifically, RCA and ARC presented data showing that (1) if the 11.7 percent contribution factor was applied to a typical wireless customer monthly bill of \$50.00; and (2) using the Joint Board's (erroneous) worst case scenario of \$2 billion for wireless ETC high-cost support in 2008, then the wireless customer's federal Fund charge would increase by 31 cents (from \$2.17 to \$2.48), or by 0.62 percent of the overall \$50.00 monthly bill.⁵⁰

It is difficult to imagine that such an increase would price consumers out of the market.

Fifth, the Commission completely ignored the fact that most of the dollars in the high-cost fund have been moved out of carrier rates (implicit) into the fund (explicit) as a result of the Commission's universal service reforms between 1996 and 2001. Thus, the burden to consumers has not increased, it has merely shifted from rates to an explicit line item.

RCA and ARC also demonstrated in the interim cap rulemaking proceeding that the shift of support from implicit rates to the explicit fund has yielded extraordinary consumer benefits, completely overlooked by the agency in its *Interim Cap Order*. For example, between 1995 and 2005, the cost of a wireless minute of use dropped from nearly 43 cents to 7.8 cents (nearly 82 percent), even factoring in universal service contributions.⁵¹ The increased competition touted by the Commission in 1997 as a primary purpose of universal service reform has had the desired

⁵⁰ RCA and ARC Comments at 13. RCA and ARC observed that a similar analysis would apply in the case of a customer of a wireline carrier with monthly interstate charges of approximately \$18 to \$19. *Id.* at 13 n.24.

⁵¹ *Id.* at 16.

effects, but has now been hidden in the *Interim Cap Order*.

Were the Commission to reexamine the rationales discussed above, we submit a different result would ensue.

3. *It Was Neither Necessary Nor Justifiable To Impose an Interim Funding Cap Only on Wireless ETCs.*

The Commission relied upon two principal arguments to support its decision that it had a rational basis to restrict the cap to wireless ETCs and that the principle of competitive neutrality⁵² did not preclude it from doing so. RCA exposes the weaknesses of each of the Commission's arguments in the following paragraphs.

a. *The Commission Incorrectly Concluded That the Interim Cap Should Be Limited to Competitive ETCs Because They Had Caused the Crisis.*

The Commission singled out competitive ETCs as the cause of the dire jeopardy faced by the Fund because "[i]n recent years, [the] growth [of the Fund] has been due to increased support provided to competitive ETCs

⁵² The core principle of competitive neutrality, adopted by the Commission pursuant to Section 254(b)(7) of the Act, requires that universal service support mechanisms must not result in any unfair competitive advantage or disadvantage. The agency has explained that it intends the principle to mean that "universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another." *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8801 (para. 47) (1997) (subsequent history omitted).

. . . .”⁵³ There are two problems with the Commission’s reasoning.

First, any attempt by the Commission to justify a unilateral cap imposed only on competitive ETCs must begin with a demonstration by the agency that there is some basis for its conclusion that uncapped growth in high-cost support disbursed to competitive ETCs in future years would make the Fund unsustainable.⁵⁴

As RCA has shown in the previous sections, however, the Commission failed to provide any support for its assumptions about the future rate of growth in competitive ETC high-cost funding, nor did the agency make any attempt to define or calculate the “break point” at which either the high-cost fund or the overall Fund would become “unsustainable” in the wake of this growth.⁵⁵ Since the Commission has failed to provide any reasonable basis for its conclusion that competitive ETCs’ high-cost support, if left uncapped, would cripple the Fund and make it unsustainable, any possible justification for imposing a unilateral cap on competitive ETCs simply vanishes.

Second, assuming *arguendo* that there could have been some credence to the Commission’s stated concerns about the dire jeopardy faced by the Fund and the agency’s expectation that the Fund would become unsustainable in the absence of remedial action, then an obvious solution (which the Commission failed to consider) could have been to cut

⁵³ *Interim Cap Order*, 23 FCC Rcd at 8837 (para. 6).

⁵⁴ *See id.* at 8837-38 (para. 6).

⁵⁵ In neglecting to attempt to define the dividing line between a sustainable and unsustainable Fund, the Commission ignored criticisms in the record of the Joint Board’s failure “to explain what it means when it says the fund could become ‘unsustainable’ . . .” RCA and ARC Comments at 7.

back on the level of funding received by incumbent LECs, because incumbent LECs receive the majority of high-cost distributions.

Instead of considering a cap on both incumbent LECs and competitive ETCs, or a unilateral cap only on incumbent LECs, the Commission fixated on the notion that the level of high-cost support to incumbent LECs had been “flat” in recent years⁵⁶ while competitive ETC high-cost disbursements had been “the fastest-growing” portion of support.⁵⁷ While the Commission placed great emphasis on this distinction, it chose to ignore the fact that the actual amount of high-cost disbursements to incumbent LECs far exceeded the amount of disbursements to competitive ETCs. For example, of the approximately \$6.96 billion in total Fund disbursements in 2007, 44.70 percent (\$3.11 billion) was received by incumbent LECs in the form of high-cost support, compared to only 16.95 percent (\$1.18 billion) received by competitive ETCs.⁵⁸ Incumbent LECs thus received about 2.6 times as much high-cost support as competitive ETCs.

Worse yet, the agency completely ignored the fact that between 2001 and 2006, incumbent LECs have lost 23 percent of their access lines.⁵⁹ As a result, the support per line to each incumbent LEC has risen dramatically.

⁵⁶ *Interim Cap Order*, 23 FCC Rcd at 8837 (para. 6).

⁵⁷ *Id.* at 8845 (para. 22).

⁵⁸ *See 2008 Monitoring Report* at 1-36, 3-15. The balance of disbursements from the Fund were for schools and libraries support, low-income support, and rural health care support.

⁵⁹ *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, WT Docket No. 08-27, Thirteenth Report, DA 09-54 (Wireless Telecom. Bur., rel. Jan. 16, 2009) (“2008 CMRS Competition Report”) at para. 229.

ly. Moreover, many incumbent LECs have seen support levels rise steadily and dramatically over the past five years, despite losing access lines. The Commission devoted no analysis to determining whether consumers who contribute to the Fund are harmed by excessive contributions to carriers with shrinking networks. Nor did the agency consider harms resulting from wireless consumer contributions of over \$3 billion per year primarily funding wireline services that those consumers are rapidly abandoning.

There is also anecdotal evidence that incumbent LECs in areas where competition is increasing have decreased support levels while incumbent LECs in less competitive areas have increased support. These troubling trends were never examined by the Commission.

At a minimum, and before settling upon a course of action that involved a unilateral and discriminatory cap on competitive ETCs' high-cost support, it would have been reasonable for the Commission to calculate the extent to which the Fund could have been stabilized by a cap on all high-cost disbursements or by a unilateral cap on incumbent LECs' high-cost support. The agency's failure to undertake such an analysis made its decision to impose a cap on competitive ETCs arbitrary and capricious as well as bad public policy.

In response to arguments that a unilateral cap on wireless carriers would conflict with its identical support rule,⁶⁰ the Commission attempted to bolster its justification for imposing the cap by contending that disbursements to wireless carriers have forced upward

⁶⁰ The Commission cited arguments in the record that the interim cap would not comport with the identical support rule because the cap would result in the disbursement of unequal support on a per line basis. *Interim Cap Order*, 23 FCC Rcd at 8843 (para. 19).

pressure on the high-cost fund because wireless services have not been a complete substitute for traditional wireline service.⁶¹ The Commission claimed that, because wireless competitive ETCs "largely provide mobile wireless telephony service in addition to a customer's existing wireline service[.]"⁶² the designation of wireless ETCs has led to "significant increases in the total number of supported lines[.]"⁶³ which in turn has increased the size of the high-cost fund.

The Commission tried to buttress these claims by arguing that wireless service is a complete substitute for wireline service only "in a small portion of households[.]" and by incorrectly citing statistics in the *2007 CMRS Competition Report*⁶⁴ showing that "only approximately 11.8 percent of U.S. households relied exclusively on wireless phones in 2006"⁶⁵ The Commission's analysis led it to question the rationale for the identical support rule, in part because, according to the agency, the rule had not promoted competition between incumbent LECs and wireless ETCs. Instead of responding to concerns that a cap on wireless carriers' high-cost funding would violate the rule, however, the Commission

⁶¹ *Id.* (para. 20).

⁶² *Id.* at 8843 (para. 20) (footnote omitted).

⁶³ *Id.* at 8844 (para. 21) (footnote omitted).

⁶⁴ *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, WT Docket No. 07-71, Twelfth Report, 23 FCC Rcd 2241 (2008) ("*2007 CMRS Competition Report*").

⁶⁵ *Interim Cap Order*, 23 FCC Rcd at 8843 (para. 20 n.62). The *2007 Competition Report* actually cited a survey that found that 11.8 percent of adults lived in wireless-only households in the second half of 2006, up from 7.8 percent in the second half of 2005. See 23 FCC Rcd at 2340-41 (para. 246).

simply noted that it was currently considering whether to eliminate the rule.⁶⁶

The Commission's reliance on a lack of complete substitutability of wireless service for wireline service as a basis for imposing a unilateral cap has been proven to be misplaced. As the agency itself has observed, there is now one cell phone for every two people on the entire planet, making the deployment of cell phones the most rapid deployment of any technology in history.⁶⁷ More specifically, the Commission, since its adoption of the *Interim Cap Order*, has also indicated that "wireless substitution has grown significantly in recent years"⁶⁸ while at the same time incumbent LECs have been losing access lines at a considerable rate,⁶⁹ "with wireless substitution being a significant reason."⁷⁰ The Commission has cited various studies showing that complete wireless substitution is 14.5 percent of adults⁷¹ and between 15.8 percent⁷² and 18 percent of households,⁷³ and projecting wireless substitution of nearly 33 percent by 2012.⁷⁴ The agency has also noted that "[i]t appears that customers are switching to wireless from wireline because

of wireless's relatively low cost and widespread availability."⁷⁵

In light of these recent developments and statistics, the Commission should revisit its reliance on the "complete substitutability" argument as a basis for imposing the unilateral cap. For the reasons the agency has convincingly articulated in the *2008 CMRS Competition Report*, the trend is moving rapidly in the direction of wireless substitution and continuing decreases in the level in incumbent LECs' access lines. This is happening, as the agency has observed, because consumers are concluding in growing numbers that wireless service provides better value than wireline service.

In these circumstances, the imposition of a unilateral cap that, on its face, makes it more difficult for wireless carriers to compete against wireline carriers in rural and high-cost areas makes no sense and represents a repudiation of consumer choice. The Commission itself has recognized that "[i]f new entrants are not provided with the same opportunity to receive universal service support as the incumbent LEC, such carriers will be discouraged from providing service and compet[ing] in high-cost areas."⁷⁶ The unilateral cap, by robbing wireless ETCs of this opportunity, reaches the precise result the Commission was trying to avoid in the *South Dakota Preemption Order*, and also stands in the way of wireless substitution, which is desired by an increasing number of consumers, by impairing entry and competition by wireless carriers. Put simply, substitution is discouraged

⁶⁶ *Id.* at 8844 (para. 21).

⁶⁷ *2008 CMRS Competition Report* at para. 228 (quoting Joel Garreau, *Our Cells, Ourselves*, WASHINGTON POST, Feb. 24, 2008).

⁶⁸ *Id.* at para. 229.

⁶⁹ *Id.* (indicating that incumbent LEC access lines dropped 23 percent between 2001 and 2006, and dropped 7 percent in 2006 alone).

⁷⁰ *Id.*

⁷¹ *Id.* This figure is for the second half of 2007.

⁷² *Id.* at para. 230. This figure is for the second half of 2007.

⁷³ *Id.* This figure is as of the end of calendar year 2006.

⁷⁴ *Id.* at paras. 229, 230.

⁷⁵ *Id.* at para. 230.

⁷⁶ *Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, CC Docket No. 96-45, Declaratory Ruling, 15 FCC Rcd 15168, 15177 (para. 23) (2000) ("*South Dakota Preemption Order*").

or precluded in any area where a new cell site is not constructed as a result of decreased high-cost support.⁷⁷

b. In Deciding To Impose the Interim Cap, the Commission Ignored Its Own Core Principle of Competitive Neutrality.

In the Telecommunications Act of 1996 (“1996 Telecom Act”),⁷⁸ Congress provided the Commission with six “core principles” to abide by when making universal service policy. Congress also gave the agency authority to adopt additional “core principles.” To date, the Commission has only adopted one: competitive neutrality. Surely the agency must carefully consider any departure from its core principle, including alternatives that achieve program goals without such a departure.

Nothing in the *Interim Cap Order* contradicts the conclusion that the unilateral cap on competitive ETCs’ high-cost support violates the core principle of competitive neutrality on its face because it targets *only* competitive ETCs. The agency’s justification for ignoring its own principle seems to have been that it was dealing with a crisis (the imminent collapse of the Fund), it had identified the supposed culprits (competitive ETCs), and the competitive neutrality principle needed to make way for the Commission’s solution (a unilateral cap on competitive ETC funding).

The Commission conceded as much, finding “that, rather than departing from the principle of competitive neutrality, as a matter of policy, we instead are temporarily prioritiz-

ing the immediate need to stabilize high-cost universal service support and ensure a specific, predictable, and sufficient fund.”⁷⁹ RCA rejects this explanation, for several reasons.

First, the Commission sought to justify its “temporarily prioritizing” of the competitive neutrality principle by claiming that high-cost support needed to be stabilized to ensure that statutory goals regarding operation of the overall Fund would be met.⁸⁰ By the Commission’s own logic, specific factual findings were necessary preconditions for the imposition of an interim cap, otherwise there would be no basis upon which to impose the cap. As RCA demonstrated to the Commission, and as summarized in this Position Paper, the Fund was not unstable, consumers were not facing “excessive” and “ever-growing” contribution obligations, nor was the Fund was in imminent danger of becoming “unsustainable.”

Second, as RCA also has explained, even if the Commission had been able to make all these findings, it still had the option of preserving competitive neutrality by simply imposing the cap across the board on both incumbent LECs and competitive ETCs. The Commission could have simply capped incumbent LEC support at the current per-line amounts that each carrier was receiving. Such a step would have avoided any competitive disadvantage, in keeping with the purpose of the competitive neutrality principle. The Commission’s failure to consider the merits of this option further undercuts its reliance on its “reprioritization” rationale as a justification for shelving the competitive neutrality principle.

⁷⁷ In fact, RCA members have had to cancel plans for new cell site construction and discontinue the operation of certain cell sites due to the significant reduction in high-cost funding to certain wireless ETCs as a result of the interim cap.

⁷⁸ Pub. L. No. 104-104, 110 Stat. 56 (1996).

⁷⁹ *Interim Cap Order*, 23 FCC Rcd at 8845 (para. 22) (footnote omitted).

⁸⁰ *Id.* See 47 U.S.C. § 254(b)(5) (providing that “[t]here should be specific, predictable and sufficient . . . mechanisms to preserve and advance universal service”).

Third, much of the discussion in this Position Paper rebutting the FCC's conclusions, has, for the purpose of discussion, assumed that the Commission has the statutory authority to ensure *sustainability* of the fund. In fact, Congress has never delegated that function to the Commission and thus the agency is without authority to create a new principle of sustainability that eclipses the principle of competitive neutrality.⁸¹

The agency, in presenting its reasons for sidestepping competitive neutrality, sought to characterize its imposition of a cap as necessary to "ensure a specific, predictable, and sufficient fund"⁸² in an effort to make it appear as though the cap would be advancing a statutorily-mandated purpose.⁸³ In fact, however, the Commission repeatedly emphasized in the *Interim Cap Order* that the cap was necessary to ensure the *sustainability* of the Fund.⁸⁴

Sacrificing competitive neutrality in pursuit of the Fund's sustainability does not work. The *Qwest* case makes it clear that the

agency does not have the authority to set aside a universal service principle, such as the principle of competitive neutrality, for the purpose of pursuing a goal or objective that is not grounded in the statute. Since the notion of the Fund's "sustainability" (unlike the principle of ensuring "specific, predictable, and sufficient" fund mechanisms) has no basis in the Act, and was not even defined or explained by the Commission, the agency overstepped its statutory authority in abandoning competitive neutrality in favor of a discriminatory cap aimed at securing "sustainability," a goal that Congress never asked the agency to pursue.

Sustaining the fund is the job of Congress, not the Commission.

C. The Cap Is Harming Consumers and Is Out of Step with Policies Needed To Stimulate the National Economy.

In adopting the *Interim Cap Order*, the Commission completely abdicated its responsibility to examine whether imposition of the cap would harm consumers in rural and high-cost areas. There was evidence in the record demonstrating the serious risk that such harm would occur. Moreover, by capping state high-cost support at March 2008 levels, the Commission froze some states out of the receipt of any high-cost support for the duration of the cap, and imposed substantial reductions in the level of support received by consumers in certain other states. In addition, the months since the Commission's imposition of the interim cap have seen the spread of a calamity affecting virtually every sector of the national economy. In these circumstances, the cap's reduction of federal funding in rural and high-cost areas has been made even more troublesome.

⁸¹ See *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001), cited in Joint Brief at 52.

⁸² *Interim Cap Order*, 23 FCC Rcd at 8845 (para. 22) (emphasis added) (footnote omitted).

⁸³ As RCA has noted, the principle of specificity, predictability, and sufficiency (in relation to fund mechanisms) appears in 47 U.S.C. § 254(b)(5).

⁸⁴ See, e.g., *Interim Cap Order*, 23 FCC Rcd at 8837 (para. 5), 8838 (para. 6), 8838 (para. 7), 8839 (para. 9), 8841 (para. 15), 8844-45 (para. 22) (noting that "[c]ontinued growth [of the Fund] at this rate [\$1.7 billion, more than 65 percent, from 2001 to 2007] would render the amount of high-cost support unsustainable"), 8850 (para. 36), 8862 (App. B, Alltel Communications, Inc., et al., Petitions for Designation as Eligible Telecommunications Carriers, para. 18 n.41), 8939 (App. D, Final Regulatory Flexibility Analysis, para. 2), 8939 (App. D, Final Regulatory Flexibility Analysis, para. 3). See also *id.* at 8945 (Statement of Chairman Martin).

1. *The Commission Failed To Consider the Impact of an Interim Cap Upon Consumers in Rural and High-Cost Areas.*

The Act requires the Commission to manage universal service funding mechanisms in a way that advances an important principle regarding the availability of services in rural and high-cost areas. Specifically, the Act requires that:

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.⁸⁵

It was incumbent upon the Commission, as part of its deliberations regarding whether to impose an interim cap on competitive ETCs, to examine the effect that such a cap would have on the provision of services in rural and high-cost areas and to evaluate whether this effect would threaten the agency's ability to fulfill the mandate established in Section 254(b)(3) of the Act. The Commission failed to undertake this analysis, and then compounded its failure by ignoring arguments in the record that consumers in rural and high-cost areas would likely be harmed by a cap on competitive ETCs' high-cost funding.

The "overarching policy goal" of the universal service provisions of the 1996 Telecom

⁸⁵ 47 U.S.C. § 254(b)(3).

Act⁸⁶ is the "preservation and advancement of universal service."⁸⁷ However, Chairman Martin expressed his support for the interim cap as a "measure[] to contain the growth of universal service in order to preserve and advance the benefits of the Fund."⁸⁸ That astonishing statement captured the Commission's wrongheaded approach to the issue. The cap on competitive ETC support "contains" the advancement of universal service, by impairing the delivery of services to consumers in rural and high-cost areas, in order to "preserve and advance the benefits of the Fund." But the Commission is supposed to advance universal service, not the Fund.

RCA and ARC argued in their Comments that "imposition of a cap would slow, and in some cases halt, the efforts of wireless carriers to build out networks in rural and high-cost areas[,]""⁸⁹ and that reduced levels of investment by wireless ETCs as a result of a cap "would have real and severe consequences for the availability of emergency communications services for people living in rural and high-cost areas."⁹⁰

⁸⁶ Brief for Respondents at 46, *RCA v. FCC*, D.C. Cir. No. 08-1284.

⁸⁷ 47 U.S.C. § 254(b).

⁸⁸ *Interim Cap Order*, 23 FCC Rcd at 8945 (Statement of Chairman Kevin J. Martin).

⁸⁹ RCA and ARC Comments at 17.

⁹⁰ *Id.* Public safety officials also filed comments opposing any imposition of a cap on wireless ETC's high-cost support. *See Interim Cap Order*, 23 FCC Rcd at 8838 (para. 7 n.28). *See also* RCA, Cellular South Licenses, Inc., N.E. Colorado Cellular, Inc., Cellcom Companies, Smith Bagley, Inc., Carolina West Wireless, Inc., Bluegrass Cellular, Inc., MTPCS, LLC, and Leaco Rural Telephone Cooperation, Joint Motion for Stay Pendente Lite, WC Docket No. 05-337, CC Docket No. 96-45, Aug. 4, 2008 (requesting the Commission to stay the *Interim Cap Order*) at 8 ("In every area where a new cell site is delayed or cancelled, hundreds of thousands

The Commission gave no consideration in the *Interim Cap Order* to the question of whether imposition of a cap on wireless ETCs would adversely affect consumers' access to emergency services in rural and high-cost areas. This is particularly perplexing in light of the fact that the Commission did observe in the *Order* that "the availability of a wireless universal service offering also provides access to emergency services that can mitigate the unique risks of geographic isolation associated with living in rural communities."⁹¹ Thus, although the agency acknowledged the unique public safety benefits provided by wireless services in rural areas, it showed no interest in ascertaining whether its interim cap would cripple the ability of wireless carriers to continue providing these benefits.

In addition, the record in the interim cap rulemaking proceeding revealed that the imposition of a cap on wireless ETCs' high-cost support would interfere with the deployment of wireless infrastructure in rural and high-cost areas, with attendant harm to consumers in those areas who depend upon the availability and reliability of wireless service.⁹² Even AT&T, a supporter of the cap, acknowledged this problem, stating that the proposed cap "undoubtedly will impose some burdens, at least in the short term, on CETCs . . . by re-

ducing the amount of high-cost funding available to deploy and maintain facilities used to serve high-cost customers[,] and complicating investment decisions."⁹³ The Commission, however, ignored these concerns and avoided making any assessment of whether and to what extent consumers would be harmed if wireless carriers were forced to reduce or halt their deployment of infrastructure.

The record also provided evidence of a related problem, namely, that imposition of an interim cap would impair the ability of wireless carriers to comply with build-out commitments they made to state regulatory commissions in applications for ETC status.⁹⁴ Failure to comply with these build-out requirements would in turn jeopardize the ETC status of these wireless carriers. The Montana Public Service Commission ("Montana PSC") expressed concern about this problem, stating that imposition of "a cap on the amount of [high-cost support CETCs] receive may put in jeopardy the build out commitments of some Montana CETCs. This may occur because the dilution of [high-cost] receipts, and in turn universal service, is inherent to the FCC's interim cap proposal."⁹⁵ Again, the Commission chose to ignore these concerns.

Commenters also argued that a discriminatory cap on wireless ETCs would impair the ability of wireless carriers to compete against incumbent LECs in rural and high-cost areas, and this diminution of competition would dis-

of citizens are denied the benefits of new and improved wireless service.").

⁹¹ *Interim Cap Order*, 23 FCC Rcd at 8862 (App. B, Alltel Communications, Inc., *et al.*, Petitions for Designation as Eligible Telecommunications Carriers, para. 15 n.38) (citing *Public Service Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the States of Georgia and Alabama*, CC Docket No. 96-45, Order, 20 FCC Rcd 6854, 6861 (para. 25) (Wireline Comp. Bur. 2005)).

⁹² See RCA and ARC, Reply Comments on *Interim Cap Notice* (June 21, 2007) ("RCA and ARC Reply Comments") at 30-31.

⁹³ AT&T, Comments on *Interim Cap Notice* (June 6, 2007) at 2 (emphasis added), *cited in* RCA and ARC Reply Comments at 30.

⁹⁴ Competitive ETCs are required by numerous state regulatory commissions to adhere to multi-year service quality plans modeled on requirements prescribed by the Commission in 47 C.F.R. § 54.202(a).

⁹⁵ Montana Public Service Commission, Comments on *Interim Cap Notice* (June 7, 2007) at 5, *quoted in* RCA and ARC Reply Comments at 32.

advantage consumers in those areas.⁹⁶ In addition, more than 3,200 members of the public urged the Commission not to impose a cap on wireless ETCs' high-cost funding, arguing, in part, that such a cap would lead to poor coverage, dropped calls, dangerous "dead zones," and a widening technology gap between urban and rural areas.⁹⁷ The Commission turned its back on these concerns.

Finally, further harms are being visited upon consumers in rural and high-cost areas because of the way in which the cap is being implemented. Not only has implementation of the interim cap imposed administrative burdens upon USAC (the costs of which ultimately are borne by consumers who pay Fund contribution charges flowed through by their carriers), but, in addition, USAC's interpretation of the interim cap and related Commission actions has resulted in further unwarranted reductions in the amount of high-cost funding available to wireless carriers.

A case in point is a decision by USAC, in the wake of the merger of Verizon Wireless and Alltel, to remove all Verizon Wireless and Alltel high-cost support payments from the capped amount of high-cost support available to wireless carriers.⁹⁸

⁹⁶ See RCA and ARC Reply Comments at 29-35.

⁹⁷ See *id.* at 35-36.

⁹⁸ See, e.g., Letter from Karen Majcher, USAC, to Donald Evans, Fletcher, Heald & Hildreth, P.L.C. (Feb. 25, 2009) ("USAC Letter") (citing *Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Management and De Facto Transfer Leasing Arrangements*, WT Docket No. 08-95, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444 (2008) ("*Verizon Merger Order*"). USAC's action has been appealed. See Corr Wireless Communications, LLC, Appeal from Decision of Administrator of High Cost Universal Service Fund, CC Docket

Verizon Wireless, in an effort to win the Commission's approval of its proposed merger with Alltel, had committed to phase out over a five-year period all high-cost support that otherwise would have been received by the merged entity.⁹⁹ As a result of the phase-down commitment made by Verizon Wireless, the Commission's approval of the merger in the *Verizon Merger Order* should have made at least \$67 million in high-cost funding available to other wireless carriers,¹⁰⁰ because the cap formula adopted in the *Interim Cap Order* established a fixed pool, the overall size of which would not be affected by changes in the number of participants in the pool. In other words, if the number of wireless ETCs increases, then the amount of disbursements to each ETC from the fixed-cap fund would decrease, but if the number of ETCs decreases, then the amount of high-cost funds disbursed to each wireless carrier would increase.¹⁰¹

USAC chose to ignore this cap formula, based on its view that the *Verizon Merger Order* precluded any redistribution of high-cost funding that was forgone by Verizon Wireless.¹⁰² USAC relied upon an "understanding" expressed by Verizon Wireless,¹⁰³ which was referenced in the *Verizon Merger Order*,¹⁰⁴ that the merged entity's high-cost

No. 96-45, WC Docket No. 05-337, filed Mar. 11, 2009 ("Corr Appeal").

⁹⁹ See Ex Parte Letter from John T. Scott, III to Marlene H. Dortch, Secretary, FCC, WT Docket No. 08-95, Nov. 3, 2008 ("Verizon Wireless Ex Parte Letter").

¹⁰⁰ See Corr Appeal at 4.

¹⁰¹ See *id.*

¹⁰² See USAC Letter at 1-2.

¹⁰³ See Verizon Wireless Ex Parte Letter at 1.

¹⁰⁴ See *Verizon Merger Order*, 23 FCC Rcd at 17531-32 (para. 196).

support should be removed from the capped pool and should not be available to other wireless carriers.

In RCA's view, USAC's decision to remove from the capped fund those amounts being received by Verizon Wireless and Alltel as of March 2008 is unsupportable because it flies in the face of the fixed cap formula adopted by the Commission in the *Interim Cap Order*. Even if USAC could persuasively argue that the Commission intended to modify the cap formula in the *Verizon Merger Order*,¹⁰⁵ the Commission was without power to effectuate any such intent without first initiating a notice and comment rulemaking proceeding.¹⁰⁶

The upshot of USAC's wayward reading of the *Verizon Merger Order* and its misapplication of the fixed cap formula in the *Interim Cap Order* is that funding that should be available to wireless carriers to provide services in rural and high-cost areas is being erroneously withheld. This withholding of funds imposes an obvious and avoidable disadvantage upon consumers residing in those areas. In addition, the anti-competitive effects of the interim cap are exacerbated by this withdrawal of additional funds, which has the effect of further harming consumers by depriving them of the benefits that accrue from the promotion of competition in rural and high-cost markets.

¹⁰⁵ No such argument can succeed because the Commission did not discuss, analyze, seek comment on, or expressly adopt in the *Verizon Merger Order* Verizon Wireless's "understanding" of how its relinquishment of high-cost funding should impact the cap formula.

¹⁰⁶ See, e.g., *American Federation of Government Employees v. FLRA*, 777 F.2d 751, 759 (D.C. Cir. 1985).

2. The Effects of the Interim Cap Are Particularly Damaging in Certain States.

As RCA has noted, the Commission capped total annual competitive ETC high-cost support for each state at the level of support that competitive ETCs were eligible to receive during March 2008 (on an annualized basis). Calculations developed by RCA show that this March 2008 cut-off has resulted in significant reductions in the amount of high-cost funding that otherwise would have been received in several states.

As shown in the following table,¹⁰⁷ a comparison of annualized 2009 capped funding with annualized 2009 funding that would have been received in the absence of the cap reveals that the interim cap is imposing substantial reductions in the amount of high-cost support that otherwise would have been received in several states.

¹⁰⁷ As previously noted, these estimates were derived based upon second quarter 2009 high-cost projections prepared by USAC in High-Cost Appendix HC01 (capped funding) and High-Cost Appendix HC01A (uncapped funding). See USAC website, accessed at <http://www.usac.org/about/governance/fcc-filings/2009/>. Figures in the table have been annualized based upon the second quarter projections.

PROJECTED EFFECT OF THE HIGH-COST SUPPORT INTERIM CAP ON 2009 ANNUALIZED FUNDING LEVELS IN SELECTED STATES				
STATE	CAP (\$)	NO CAP (\$)	LOSS (\$)	PCT LOSS
Alabama	18,721,248	44,400,252	25,679,004	57.8
Alaska	75,033,288	97,728,012	22,694,724	23.2
Colorado	10,073,592	12,126,960	2,053,368	16.9
Idaho	7,640,532	13,612,416	5,971,884	43.9
Illinois	14,484,036	16,919,436	2,435,400	14.4
Iowa	61,309,744	89,111,760	27,646,226	31.2
Kansas	85,862,136	109,460,700	23,598,564	21.6
Louisiana	65,443,720	79,285,920	13,842,200	17.5
Michigan	22,631,700	31,588,712	8,957,012	28.3
Montana	12,345,008	17,426,116	5,081,108	29.2
Nebraska	57,845,972	67,370,460	9,524,488	14.1
Nevada	7,147,572	9,285,996	2,138,424	23.0
New Hampshire	218,388	1,785,540	1,567,152	87.8
New Mexico	14,415,588	34,318,140	19,902,552	58.0
New York	3,217,092	6,699,204	3,482,112	52.0
N. Carolina	10,175,832	36,534,360	26,358,528	72.1
N. Dakota	45,150,552	56,275,944	11,125,392	19.8
Oklahoma	34,049,280	48,682,200	14,329,920	30.1
S. Carolina	5,747,544	8,993,568	3,246,024	36.1
S. Dakota	36,016,660	41,954,876	5,938,216	14.2
Tennessee	1,232,124	5,772,384	4,540,260	78.7
Texas	34,792,260	43,283,028	8,490,768	19.6
Virginia	15,237,828	26,749,488	11,511,660	43.0
Washington	35,440,824	40,737,528	5,292,704	13.0
West Virginia	17,883,904	20,281,940	2,398,036	11.8
Wisconsin	57,905,276	73,171,344	15,266,068	20.9

These reductions, as RCA has discussed, make it exceptionally difficult for wireless ETCs to carry out their infrastructure deployment and to meet commitments regarding build-outs and service quality. In several of the states listed in the table, the inequitable reduction in funding is a product of the Commission's decision to grant a number of pending ETC designations contemporaneously with the agency's adoption of the *Interim Cap Order*.¹⁰⁸

¹⁰⁸ The Act gives the Commission authority to designate common carriers as ETCs in certain circumstances. See 47 U.S.C. §214(e)(6). The Commission exercised this authority in the *Interim Cap Order* to designate ETCs in Alabama, New Hampshire, New

The effect of this combined action—the imposition of a cap and the addition of new ETCs entitled to high-cost support—has been to increase the overall level of disbursements to which ETCs were entitled, but then to cap the level of support, so that the full amount of these new entitlements cannot be received because, in each of the affected states, new ETCs and existing ETCs are forced to share a funding pool capped at the March 2008 level.

York, North Carolina, Pennsylvania, Tennessee, and Virginia. See *Interim Cap Order*, 23 FCC Rcd at 8857 (App. B, Alltel Communications, Inc., *et al.*, Petitions for Designation as Eligible Telecommunications Carriers).

As the table shows, in some states the gap is substantial.

The Commission in the *Interim Cap Order* gave no indication that it was aware of, or concerned about, this unreasonable and unfair result. Moreover, the unfair funding disparities could have been avoided if the Commission had acted in a timely manner on the ETC petitions that it finally addressed in the *Interim Cap Order*.¹⁰⁹ The effect of the Commission's failure to consider the consequences of its March 2008 "flash cut" cap, combined with the agency's lassitude in acting on pending ETC petitions, has been to rob consumers in the affected states of the facilities and services that would have been deployed by wireless ETCs if the full level of high-cost funding had been made available to these carriers.

It is also instructive to note that the harmful effects of the mechanism chosen by the Commission to impose the interim cap are not limited to carriers' operations in the states listed in the above table. For example, the Montana PSC's concerns, described earlier by RCA, have materialized. At the time it granted an ETC designation to MTPCS, LLC ("MTPCS"), the Montana PSC required the carrier to deploy facilities sufficient to provide service to 98 percent of the population in the relevant service areas within five years. The Commission's interim cap, which was imposed shortly after the Montana PSC granted MTPCS's petition for designation, will result in a 36 percent reduction in MTPCS's high-cost support. This reduction will hamstring MTPCS's deployment of facilities, "curtail the deployment of new services,

¹⁰⁹ For example, one of the U.S. Cellular ETC petitions for Tennessee was filed in June 2005, and a U.S. Cellular ETC petition for Virginia was filed in April 2004. See *Interim Cap Order*, 23 FCC Rcd at 8875.

and delay the service expansion mandated by the [Montana] PSC."¹¹⁰

Finally, an additional unfairness arising from the March 2008 cut-off date stems from the fact that seven states are precluded from receiving any high-cost support at all. These states—Connecticut, Delaware, Maryland, Massachusetts, New Jersey, Ohio, and Rhode Island—had not designated any competitive ETCs prior to the Commission's imposition of the cap. Therefore, funding in those states is capped at zero (the amount of funds disbursed in March 2008) and no high-cost support can be made available in any of these jurisdictions until the cap is removed.

3. The Hardships Caused by the Funding Reductions Imposed by the Interim Cap Are Being Amplified by the Worsening State of the National Economy.

The national economy is facing a crisis. Jobs are evaporating,¹¹¹ homes are being seized, people are losing their health insurance, production is falling,¹¹² commercial real estate investment is being cut back, banks are failing, credit has dried up, consumer spending is shutting down,¹¹³ state and local governments' budgets are collapsing, U.S. ex-

¹¹⁰ Joint Motion for Stay Pending Judicial Review, *RCA v. FCC*, Nos. 08-1284 & 08-1285 (D.C. Cir. Oct. 9, 2008) at 19.

¹¹¹ See Edmund L. Andrews, *598,000 Jobs Lost as Jobless Rate Hit 7.6% in January*, N.Y. TIMES, Feb. 7, 2009, accessed at <http://www.nytimes.com/2009/02/07/business/economy/07jobs.html?hp>.

¹¹² Ylan Q. Mui & Howard Schneider, *Economic Data Get Even Worse*, WASH. POST, Feb. 6, 2009, at D2 (depressed demand in the U.S. and abroad caused U.S. factory orders to decrease 3.9 percent in December 2008).

¹¹³ *Id.* (retail sales fell in January for the fourth straight month).

ports are plunging, the stock market has been driven downward, and the economy may be headed for a “prolonged deflationary trap.”¹¹⁴

The telecommunications sector is not proving to be immune from this growing economic crisis. Company income and profits are falling,¹¹⁵ customer growth is slowing,¹¹⁶ jobs

¹¹⁴ Paul Krugman, *On the Edge*, N.Y. TIMES, Feb. 6, 2009, at A27.

¹¹⁵ See, e.g., Maisie Ramsay, *Qwest's Earnings Hit, Posts Job Cuts of 1,700*, WIRELESS WEEK, Feb. 10, 2009, accessed at <http://www.wirelessweek.com/article.aspx?id=16636> (“Qwest”) (the company posted net income of \$185 million for the fourth quarter of 2008, compared to \$366 million for the same quarter in 2007); Peter Svensson, *Cisco Earnings Down; January Notably Weak*, WIRELESS WEEK, Feb. 5, 2009, accessed at <http://www.wirelessweek.com/article.aspx?id=166050> (“Svensson”) (the company’s profits for the fourth quarter of 2008 were \$1.5 billion, compared to \$2.1 billion for the same period in 2007); Maisie Ramsay, *Alcatel-Lucent Posts Another Loss*, WIRELESS WEEK, Feb. 4, 2009, accessed at <http://www.wirelessweek.com/article.aspx?id=166036> (the company posted losses of \$5.01 billion for the fourth quarter of 2008, compared with last year’s loss of \$3.31 billion); Maisie Ramsay, *Motorola Posts \$3.6 Billion Loss*, WIRELESS WEEK, Feb. 3, 2009, accessed at <http://www.wirelessweek.com/article.aspx?id=166008> (“Ramsay”) (Motorola’s losses were \$1.57 per share for the fourth quarter of 2008, compared to profits of 4 cents per share); Lynnette Luna, *Industry Struggles in 4Q, But Silver Lining Lies in Smartphones*, FIERCE WIRELESS, Feb. 2, 2009, accessed at <http://www.fiercewireless.com/node/36675> (“Luna”) (Qualcomm’s net income plummeted to \$341 million for the quarter ending December 2008); Maisie Ramsay, *Qualcomm's 1Q Income Halved by Investment Losses*, WIRELESS WEEK, Jan. 29, 2009, accessed at <http://www.wirelessweek.com/article.aspx?id=165778> (Qualcomm posted a charge of \$388 million on losses in marketable securities, and indicated it has \$1.1 billion in unrealized investment losses between December 28 and January 23); Evan Koblentz, *Palm Loses \$508M, Defends Linux Opportunity*, WIRELESS WEEK, Dec. 19, 2008, accessed at [are being cut,¹¹⁷ cellular phone and other wireless device sales are dropping,¹¹⁸ invest-](http://www.wirelessweek.com/Palm-Loses-$508M-Linux-Oppor-</p></div><div data-bbox=)

tunity.aspx (“Koblentz”) (Palm lost \$508.6 million in the second fiscal quarter of 2009, with revenue of \$191.6 million).

¹¹⁶ See, e.g., Matt Richtel, *Can the Cellphone Industry Keep Growing?* N.Y. TIMES, Feb. 4, 2009, accessed at <http://www.nytimes.com/2009/02/04/technology/companies/04cell.html>? (“Richtel”) (noting that “wireless carriers are finding it harder to acquire and keep customers”); Allie Winter, *T-Mobile USA Posts Difficult Q4*, RCR WIRELESS, Jan. 29, 2009, accessed at <http://www.rcrwireless.com/apps/pbcs.dll/article?AID=/20090129/WIRELESS/90129995> (T-Mobile added 621,000 customers in the fourth quarter of 2008, compared to 670,000 in the third quarter and 951,000 in the fourth quarter of 2007); Allie Winter, *Data ARPU, Churn Up at Verizon Wireless*, RCR Wireless, Jan. 27, 2009, accessed at <http://www.rcrwireless.com/apps/pbcs.dll/article?AID=/20090129/WIRELESS/901279991> (net customer growth for the fourth quarter of 2008 was 1.4 million, the smallest quarterly growth since the second quarter of 2003).

¹¹⁷ See, e.g., Phil Carlson, *Brightpoint To Cut Spending, Jobs*, RCR WIRELESS, Feb. 10, 2009, accessed at <http://www.rcrwireless.com/apps/pbcs.dll/article?AID=/20090129/WIRELESS/902109987> (“Brightpoint”) (the handset distributor announced it will reduce its workforce by 7 percent); Qwest (Qwest cut 1,700 jobs, or 11 percent of its workforce); *Out of Work in Wireless*, FIERCE WIRELESS, accessed at <http://www.fiercewireless.com/node/36308> (indicating that Ericsson announced plans to lay off 5,000 employees, Motorola plans to cut 4,000 more jobs, AT&T announced plans to eliminate 12,000 jobs, Virgin Mobile USA has released 10 percent of its workforce, and Nokia Siemens has cut 9,000 jobs); Luna (Sprint announced 8,000 job cuts, which is about 14 percent of the company’s entire workforce); Phil Carlson, *Texas Instruments Cuts 3,400 Jobs*, RCR WIRELESS, Jan. 27, 2009, accessed at <http://www.rcrwireless.com/apps/pbcs.dll/article?AID=/20090129/WIRELESS/901279989> (the company plans to cut 12 percent of its workforce through layoffs and voluntary retirements).

¹¹⁸ See, e.g., Richtel (Motorola’s cell phone sales for the fourth quarter of 2008 were down 53 percent from the same period in 2007); Ramsay (Motorola’s

ment in wireless companies is predicted to decline in 2009,¹¹⁹ demand for telecommunications network equipment is slumping,¹²⁰ salaries and operating budgets are being cut, company retirement fund contributions are being suspended,¹²¹ and company debt ratings are being downgraded.¹²²

handset division, “which accounts for about 40 percent of the company’s sales, has been hemorrhaging cash for some time”); Phil Carlson, *2009 Wireless Forecast: Handsets*, RCR WIRELESS, Feb. 2, 2009, accessed at <http://www.rcrwireless.com/apps/pbcs.dll/article?AID=/20090129/WIRELESS/902029982> (analysts predict that handset sale volumes in Europe and the Americas will be down between 15 percent and 18 percent in the first quarter of 2009); Koblentz (Palm’s device sales dropped 13 percent from 2008).

¹¹⁹ See, e.g., *VCs Look for Recovery in 2010*, WIRELESS WEEK, Dec. 18, 2008, accessed at <http://www.wirelessweek.com/VC-Recovery-2010.aspx> (a majority of venture capitalists polled in a recent survey expect wireless investing to decline in 2009).

¹²⁰ See, e.g., Svensson (orders for Cisco products dropped 20 percent in January, compared to January 2008); Evan Koblentz, *Alcatel-Lucent Cutting Staff, Products*, WIRELESS WEEK, Dec. 12, 2008, accessed at <http://www.wirelessweek.com/Alcatel-Lucent-Staff-Products.aspx> (the company expects the market for telecommunications equipment and related deployment services to be down between 8 percent and 12 percent).

¹²¹ See, e.g., Phil Carlson, *Doing More with Less: The Enterprise’s Marching Orders in an Economic Downturn*, RCR WIRELESS, Feb. 11, 2009, accessed at <http://www.rcrwireless.com/apps/pbcs.dll/article?AID=/20090129/WIRELESS/902109973> (indicating that “[f]aced with uncertain financial conditions, corporations are cutting capital and operating budgets and the outlook for information technology spending this year—where wireless spend[ing] resides—has contracted from last year”); Brightpoint (the handset distributor announced it plans to cut spending in 2009 by \$40 million to \$45 million); Phil Carlson, *Pay Cuts at Motorola*, RCR WIRELESS, Dec. 17, 2008, accessed at <http://www.rcrwireless.com/apps/pbcs.dll/article?AID=/20090129/WIRELESS/812179993> (Motorola announced that pension plans and some salaries are

Even if the interim cap made any policy sense at the time it was imposed—which it most emphatically did not—the alarming developments that have engulfed the national economy, and the severe downturn in the telecommunications sector, since the Commission adopted the cap in April of last year now provide a powerful reason for the agency to repeal the cap.

The purpose of the cap is to reduce support for wireless services in rural and high-cost areas. The effect of the cap is to reduce investment in the deployment of wireless infrastructure and services in these areas. As RCA has shown, the Commission had no reasonable basis for concluding that the Fund needed saving, nor could the agency advance any plausible case that imposing a discriminatory, anti-competitive cap on wireless carriers was the only option for averting a crisis that did not exist in the first place.

Now, as the entire national economy faces a real crisis, the Commission should revisit and repeal an action that is miles removed from the course that the government should be following as it seeks to stabilize and sustain the economy.

The Commission also should take note of the fact that the interim cap—by *decreasing* the amount of funds available for use in bringing advanced telecommunications services to consumers in rural and high-cost

being frozen, company contributions to employee retirement funds are being suspended, and the companies co-chief operating officers will take a 25 percent cut in base salary).

¹²² See, e.g., Allie Winter, *Sprint Nextel Tumbles to “Junk,”* RCR WIRELESS, Dec. 10, 2008, accessed at <http://www.rcrwireless.com/apps/pbcs.dll/article?AID=/20090129/WIRELESS/8112109980> (Sprint’s unsecured debt rating was moved to non-investment grade, reflecting the company’s weakened market position).

areas—is perversely swimming against the tide of government efforts to spend more money to expand and improve telecommunications services in rural, high-cost, and other areas throughout the United States. Specifically, Congress has enacted legislation¹²³ making available \$7.2 billion in funding¹²⁴ to provide consumers in unserved and underserved areas throughout the United States with greater access to broadband services.

Congress funded BTOP for the purposes of providing access to broadband services to consumers in unserved and underserved areas; to provide broadband education, awareness, training, access and support to schools, libraries, medical and healthcare providers, colleges and universities, and other agencies and organizations; improve access to broadband services by public safety agencies; and to stimulate economic growth and create jobs.

The ARRA and BTOP reflect efforts by the Federal Government to provide relief to consumers, businesses, state and local governments and agencies, and other organizations and institutions during a time of economic crisis. Removal of the interim cap would restore the full capability of the universal service program to match these efforts by enabling wireless carriers to continue and expand their services in rural and high-cost areas.

Supporters of the cap, including those who benefit from its retirement of competitive neutrality, might claim that repealing the cap is unnecessary and would serve no purpose in

¹²³ American Recovery and Reinvestment Act of 2009, P.L. 111-5 (Feb. 17, 2009) (“ARRA”) (Title VI–Broadband Technology Opportunities Program (“BTOP”).

¹²⁴ Ed Gubbins, *The Broadband Stimulus Scramble*, TELEPHONY ONLINE, Mar. 18, 2009, accessed at <http://telephonyonline.com/independent/commentary/broadband-stimulus-funding-0318/?cid=hcom>.

the context of the current economic crisis. They might argue that repeal of the cap would not act as an economic stimulus because it would not inject any government funding into the economy, but would instead take money out of the pockets of users of interstate telecommunications services.

As RCA has shown, however, the growth in high-cost support for competitive ETCs has not caused any financial hardship on consumers paying surcharges as a result of the flow-through of Fund contributions by carriers. On the other hand, restoring high-cost support that has been cut off by the cap would in fact act as a stimulus in rural and high-cost areas, and would work in tandem with the funds for broadband deployment included in the ARRA. Investment in infrastructure and expansion of wireless services would be a direct source of jobs, and would also spur further economic development, since economic growth is directly tied to the presence of a ubiquitous, reliable, and advanced telecommunications infrastructure.

IV. CONCLUSION.

The Commission should repeal the cap on high-cost support to wireless carriers for numerous reasons. The agency failed to support its conclusion that the Fund faced an imminent crisis when it took action to impose the cap, and it also failed to make a plausible case that, without intervention, the Fund would continue to grow at a pace that would make it unsustainable. The agency avoided explaining what it meant by the “unsustainability” of the Fund, thus making it impossible to evaluate the Commission’s claims that future growth, if unchecked, would push the Fund across this undefined line.

The agency attempted to support a unilateral cap on wireless carriers by claiming that these carriers had caused the funding crisis, but it relied upon an unreasonable analysis of

recent growth rates as well as unsupportable projections of future growth in making its claims. The Commission also failed to support its assertion that consumers paying universal service surcharges would be harmed if a cap was not imposed. The agency made no attempt to document the extent of this harm, and ignored discussion in the record showing that uncapped disbursements to wireless carriers would have only a minimal impact on the average customer's monthly bills.

The reasons for removing the interim cap become even stronger when we consider what has happened in the nearly one-year period since the cap was imposed, and what is likely to happen if the cap continues to be in effect.

Because of the ground rules the Commission set up for the interim cap, several states have been placed in the position of not being able to receive *any* high-cost funding for wireless carriers for the duration of the cap. In addition, a large number of states have experienced substantial reductions in the amount of high-cost support available to wireless carriers, compared to amounts that would have been available in the absence of the cap.

These funding reductions in many states have two significant consequences. Wireless carriers are now finding it more difficult to meet commitments they have made to state regulatory commissions regarding the construction of network infrastructure and the pricing and quality of their services. Wireless carriers also have been placed at a competitive disadvantage, since the cap applies only to them and not to incumbent LECs, and this has a negative effect on wireless carriers' in-

vestment decisions and entry into rural and high-cost markets.

A second consequence is the impact of the cap on consumers in rural and high-cost areas. This impact flows logically from the cuts in wireless carriers' funding: The expansion of networks to deliver wireless services has been slowed or halted, and competitive entry has been impaired. This means that consumer demand for wireless service—which continues to grow, with more and more consumers completely substituting wireless service for their old wireline service—cannot be met. Consumers in rural and high-cost areas, because of the interim cap, have less opportunity to rely on wireless services to access emergency medical and public safety services, to take advantage of telemedicine services in order to improve the quality of their health-care, to access educational and training opportunities that otherwise may not be available in rural and remote areas, and to access a variety of services and features provided by advanced mobile broadband services.

Another development since the Commission adopted the cap is the collapse of the national economy. In light of these developments, which have had a serious impact on the telecommunications sector, there cannot be any reasonable basis for continuing to cut off urgently needed funding for wireless services in rural and high-cost areas.

For all these reasons, RCA strongly supports a repeal of the interim cap on wireless carriers' high-cost funding.